



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

ATTORNEY GENERAL OPINION NO. 86-7

TO: Dana L. Rayborn Wetzel
City Attorney
Coeur d'Alene, Idaho 83814

Per Request for Attorney General's Opinion

QUESTION PRESENTED:

Whether the Coeur D'Alene police department must disclose all documents and records to the public or the news media.

CONCLUSION:

Generally, public records are open to the public. However, Idaho Code § 9-335(1) (Supp. 1986) exempts from disclosure certain law enforcement investigatory records and documents that might otherwise be subject to disclosure under Idaho Code chapter 3, title 9, or other related statutes.

ANALYSIS:

Idaho Code chapter 3 of title 9 affords the public the right and opportunity to examine public records of state and local officers. The Idaho Supreme Court has held that unless otherwise exempted by statute, all public records are subject to inspection by any citizen of this state. Dalton v. Idaho Dairy Products Commission, 107 Idaho 6, 9, 684 P.2d 983, 986 (1984). The Dalton court defined public documents as all "[w]ritings coming into the hands of public officers in connection with their official functions" 107 Idaho at 10, 684 P.2d at 987.

1. Exemptions from Disclosure of Active Investigatory Records

In response to the Idaho Supreme Court's holding in Dalton, the Idaho Legislature enacted Idaho Code § 9-335, governing disclosure of law enforcement investigatory records

and documents. Because of its recent enactment, the courts have not yet interpreted section 9-335. Therefore, our analysis relies on general rules of statutory construction. Prefatorily, it should be noted that Idaho Code § 9-335 is effective only through June 30, 1987.

The general rules for statutory interpretation of an Idaho statute based upon or adopted from a foreign statute are well settled. When a statute is adopted from another jurisdiction it is presumed to be adopted with the prior construction placed upon it by the courts of such other jurisdiction. See Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983). The genesis of Idaho Code § 9-335 is exemption seven of the Freedom of Information Act (FOIA), 5 U.S.C.A. § 552 (b)(7) (1977). Accordingly, Idaho Code § 9-335 should be construed consistently with the FOIA. See Odenwalt v. Zaring, 102 Idaho 1, 624 P.2d 383, (1980); see also, Marlin v. Lewallen, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 464 (1928).

Exemption seven of the FOIA provides exemption from disclosure for certain law enforcement records and documents classified as "investigatory." "Investigatory" records or documents are (1) compiled for law enforcement purposes, (2) compiled by a law enforcement agency, (3) contain certain information with respect to an identifiable person or group of persons, and (4) contain information which resulted from the investigation of a specific act or omission. 5 U.S.C.A. § 552 (b)(7).

Once it is determined that a disclosure request pertains to "investigatory records compiled for law enforcement purposes,"¹ the next step is to determine whether disclosure of the information would trigger one of the harms specified in Idaho Code § 9-335(1)(a) through (f). If not, the material

¹ The exemption from disclosure of investigatory records is not limited to the enforcement of criminal laws; it applies to investigatory materials relating to the enforcement of civil laws as well. Pope v. United States, 599 F.2d 1383 (5th Cir. 1979).

must be released despite its characterization as an "investigatory record compiled for law enforcement purposes."²

Idaho Code § 9-335(1) exempts disclosure of law enforcement investigatory records in six instances:

Notwithstanding any statute or rule of court to the contrary, nothing in this chapter nor chapter 10, title 59, Idaho Code, shall be construed to require disclosure of investigatory records compiled for law enforcement purposes by a law enforcement agency, but such exemption from disclosure applies only to the extent that the production of such records would:

- (a) Interfere with enforcement proceedings;
- (b) Deprive a person of a right to a fair trial or an impartial adjudication;
- (c) Constitute an unwarranted invasion of personal privacy;
- (d) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement agency in the course of a criminal investigation, confidential information furnished only by the confidential source;
- (e) Disclose investigative techniques and procedures; or
- (f) Endanger the life or physical safety of law enforcement personnel.

A brief discussion of these six exemptions and an explanation of federal court interpretations should provide guidance for individuals evaluating disclosure requests.

²However, restrictions upon disclosure other than those expressly set forth in exemption seven may also apply. Exemption five of the FOIA precludes the disclosure of an attorney's work product. 5 U.S.C.A. § 552 (b)(5)(1977). Rule 6 of the Federal Rules of Criminal Procedure prohibits the disclosure of grand jury proceedings. Canon 4 of the Code of Professional Responsibility (DR 4-101) precludes an attorney from disclosing confidential client information without prior approval.

(a) Interference with enforcement proceedings, as interpreted by the federal courts, includes prematurely revealing the government's case, thus enabling suspected violators to construct defenses in response thereto, Barney v. Internal Revenue Service, 618 F.2d 1268 (8th Cir. 1980); Polynesian Cultural Center, Inc. v. National Labor Relations Board, 600 F.2d 1327 (9th Cir. 1979); enabling litigants to discern the identity of prospective government witnesses, as well as confidential informants, or the nature of the government's evidence and strategy, Kanter v. Internal Revenue Service, 433 F.Supp. 812 (N.D.Ill. 1977); and exposing affiants and potential witnesses to intimidation or harassment, Polynesian Cultural Center, 600 F.2d at 1328.

(b) Another ground for exemption is disclosure of law enforcement records that would "deprive a person of a fair trial or an impartial adjudication" of his or her case. I.C. § 9-335(1)(b); 5 U.S.C.A. § 552(b)(7)(B). The intent of this section is to insure that parties will not be prejudiced by premature release of information concerning their case. Marathon Oil (DOE, November 22, 1978) case no. DFA-0254; Gilmore Broadcasting Corp., FCC 78-845, FOIA control no. 8-51, 44 ADL.2d 886 (1978).

(c) A third ground for exemption exists whenever disclosure of law enforcement investigatory records or reports would cause an "unwarranted invasion of personal privacy." Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977); 5 U.S.C.A. § 552(b)(7)(C). The courts have not defined what constitutes "an unwarranted invasion of personal privacy" within the meaning of this exemption. Rather, courts have applied a balancing test whereby the individual's interest in maintaining privacy is weighed against the public's need for disclosure.

In applying this balancing test, courts have held that revealing (1) identities of persons who were the subjects of enforcement investigations, (2) identities of persons providing information to the law enforcement agency, (3) identities of third persons referred to in investigation records, or (4) identities of investigating officers or other agents, constituted unwarranted invasions of personal privacy. See Nix v. United States, 572 F.2d 998 (4th Cir. 1978).

(d) The fourth exemption from disclosure was created to encourage cooperation from confidential informants. Thus, governmental agencies need not disclose "the identity of a confidential source" of information, or the information obtained from that source. Founding Church of Scientology of

Washington, D.C., Inc. v. Regan, 670 F.2d 1158 (D.C. Cir. 1981). The Senate Conference Report No. 93-1200, 3 U.S. Code Cong. and Adm. News, 93 Congress 2d Sess. (1974), states that an agency can, in cases involving enforcement of civil or criminal law, withhold the names, addresses and other information that would reveal the identity of a confidential source, but that all of the information furnished by such sources may be withheld where the records in question were compiled by a criminal law enforcement authority.

Thus, with regard to civil enforcement proceedings the identity of witnesses may not be disclosed, but the contents of affidavits may be disclosed. Furr's Cafeterias, Inc. v. National Labor Relations Board, 416 F.Supp. 629 (N.D.Tex. 1976). In criminal cases, once the source of information is established to be "confidential," the exemption applies to both the identity of the source as well as the information provided, Shaver v. Bell, 433 F.Supp. 438 (N.D.Ga. 1977), including information that is not, strictly speaking, "confidential," because identical information has been furnished by a nonconfidential source. Lame v. United States Department of Justice, 654 F.2d 917 (3d Cir. 1981). The practical effect of this exemption is that it is unnecessary and contrary to the statute to consider whether the exempt documents can be edited to exclude details that might identify informants. Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980).

(e) The fifth exemption from disclosure applies to documents that would reveal to the public the investigative techniques and procedures utilized by law enforcement agencies. This exemption applies only to specialized and obscure techniques and procedures, Shaver, supra, not to routine techniques already known to the general public.³ Ferguson v. Kelly, 448 F.Supp. 919 (N.D.Ill. 1979) (disapproved on other grounds by Keeney v. Federal Bureau of Investigation, 630 F.2d 114 (2d Cir. 1980)).

³Similarly, this exemption does not apply to records falling into the scope of 5 U.S.C.A. § 552 (a)(2), that provides for the disclosure of ordinary staff manuals and instructions that affect the public. Cox v. United States Department of Justice, 576 F.2d 1302 (8th Cir. 1978).

3. Summary

The question presented is broad. As a rule, the public has access to public documents. However, in the case of active investigatory records, six exclusions preclude disclosure. Records are "investigatory" when they are compiled by and for a law enforcement agency and contain information about identifiable persons resulting from an investigation. Such records must be released unless disclosure would (1) interfere with enforcement proceedings, (2) deprive a person of a fair trial, (3) constitute an unwarranted invasion of privacy, (4) disclose the identity or information furnished by a confidential informant, (5) disclose non-routine investigative techniques or procedures, or (6) endanger the life or safety of law enforcement personnel. Inactive records must be disclosed, unless one of the "active" exemptions applies. The courts have held that such records are exempt from disclosure. A party denied access to such information may apply to the state courts to determine whether the denial of disclosure is warranted. The agency denying disclosure bears the burden of establishing exemption.

AUTHORITIES CONSIDERED:

Idaho Statutes:

Idaho Code § 9-301 (1979)
Idaho Code § 9-335 (Supp. 1986)
Idaho Code § 59-1009 (1976)

Idaho Cases:

Dalton v. Idaho Dairy Products Commission, 107 Idaho 6,
684 P.2d 983 (1984)
Leliefeld v. Johnson, 104 Idaho 357, 659 P.2d 111 (1983)
Odenwalt v. Zaring, 102 Idaho 1, 624 P.2d 383 (1980)

Federal Cases:

National Labor Relations Board v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978)

(f) The final exemption from disclosure of law enforcement investigatory records applies when release of the records would "endanger the life or physical safety of law enforcement personnel." Thus, the disclosure of the names of law enforcement personnel may be precluded. Nunez v. Drug Enforcement Administration, U.S. Department of Justice, 497 F.Supp. 209 (S.D.N.Y. 1980). Further, their names may have to be deleted from otherwise disclosable material. Shaver, 433 F.Supp. at 438. This exemption applies only to law enforcement agencies. Agencies not legitimately involved in law enforcement will not normally be included in this exemption, even if the possibility of danger to their employees exists. Fonda v. Central Intelligence Agency, 434 F.Supp. 498 (D.D.C. 1977).

2. Inactive Investigatory Records

The guidelines sketched above govern access to active law enforcement investigatory files. Access to inactive investigatory records is governed by Idaho Code § 9-335(2), which states:

An inactive investigatory record shall be disclosed unless the disclosure would violate the provisions of subsection (1)(a) through (f) of this section. Investigatory record as used herein means information with respect to an identifiable person or group of persons compiled by a law enforcement agency in the course of conducting an investigation of a specific act or omission and shall not include the following:

- (a) The time, date, location, and nature and description of a reported crime, accident, or incident;
- (b) The name, sex, age, and address of a person arrested, except as otherwise provided by law;
- (c) The time, date, and location of the incident and of the arrest;
- (d) The crime charged;
- (e) Documents given or required by law to be given to the person arrested;
- (f) Informations and indictments except as otherwise provided by law; and
- (g) Criminal history reports.

This section identifies those portions of inactive or closed documents that are not exempt from disclosure under section 9-335 and, therefore, must be disclosed provided they do not violate any of the exemptions discussed earlier in this opinion. Documents whose exemption is based solely upon possible "interference with enforcement proceedings" are no longer exempt after completion of the actual or contemplated proceedings, provided no other exemptions apply at that time.

However, not all exemptions lose their force immediately upon conclusion of the investigation. In some cases the potential for enforcement proceedings remains for some time. Pope, supra. In such cases an agency's closed files relating to enforcement proceedings may still be exempt from disclosure, provided such records are relevant to other cases and at least one of the six specified conditions for exemption exists. New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377 (1st Cir. 1976).

In order for an agency to justify the withholding of information on the ground that its disclosure would interfere with some future enforcement investigation, the agency must show that the relevant investigation is most likely to occur. RCA Global Communications Inc. v. Federal Communications Commission, 524 F.Supp. 579 (D.Del. 1981).

Most of the items set forth above in Idaho Code § 9-335 (2), require no explanation. However, subsection (e) warrants clarification. A review of the legislative history of exemption seven and comments of the U.S. Attorney General's 1974 amendments to the FOIA⁴ clarify the intended meaning of § 9-335(2)(e). This section should be construed to mean that the exemptions provided in Idaho Code § 9-335 (1) are not intended to repeal or foreclose discovery rights of litigants such as those under the Jencks Act or the Federal Rules of Civil or Criminal Procedure. Subsection (e) does not provide that those documents discoverable by party litigants are also disclosable to the public in general. A.G.'s Amendments to FOIA 1974 n.3 at 5.

⁴ U.S. Attorney General Opinion 1967 FOI Memorandum at 38.

Marlin v. Lewallen, 276 U.S. 58, 48 S.Ct. 248, 72 L.Ed. 464 (1928)

Founding Church of Scientology of Washington, D.C. Inc., v. Regan, 670 F.2d 1158 (D.C. Cir. 1981), cert. denied 102 S.Ct. 2242 (1982)

Lame v. United States Department of Justice, 654 F.2d 917 (3d Cir. 1981).

Duffin v. Carlson, 636 F.2d 709 (D.C. Cir. 1980)

Keeney v. Federal Bureau of Investigation, 630 F.2d 114 (2d Cir. 1980)

Barney v. Internal Revenue Service, 618 F.2d 1268 (8th Cir. 1980)

Polynesian Cultural Center, Inc. v. National Labor Relations Board, 600 F.2d 1327 (9th Cir. 1979)

Pope v. United States, 599 F.2d 1383 (5th Cir. 1979)

Cox v. United States Department of Justice, 576 F.2d 1302 (8th Cir. 1978)

Nix v. United States, 572 F.2d 998 (4th Cir. 1978)

Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977)

New England Center Hospital v. National Labor Relations Board, 548 F.2d 377 (1st Cir. 1976)

RCA Global Communications, Inc. v. Federal Communications Commission, 524 F.Supp. 579 (D.Del. 1981)

Nunez v. Drug Enforcement Administration, U.S. Department of Justice, 497 F.Supp. 209 (S.D.N.Y. 1980)

Ferguson v. Kelly, 448 F.Supp. 919 (N.D.Ill. 1979)

Fonda v. Central Intelligence Agency, 434 F.Supp. 498 (D.D.C. 1977)

Kanter v. Internal Revenue Service, 433 F.Supp. 812 (N.D.Ill. 1977)

Shaver v. Bell, 433 F.Supp. 438 (N.D.Ga. 1977)

Furr's Cafeterias, Inc. v. National Labor Relations Board,
416 F.Supp. 629 (N.D.Tex. 1976)

Other Authorities:

5 U.S.C.A. § 552(b)(5) (1977)

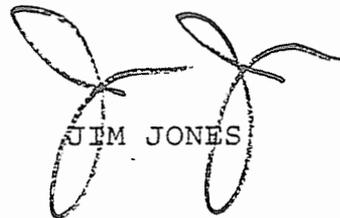
5 U.S.C.A. § 552(b)(7) (1977)

15 Fed. Proc. L.Ed. §§ 38:126 through 38:138

73 AM. JUR. 2D Statutes §§ 333, 334, 337, 339 (1974)

DATED this 7th day of Aug., 1986.

ATTORNEY GENERAL FOR THE
STATE OF IDAHO



JIM JONES

ANALYSIS BY:

JOHN J. McMAHON
Chief Deputy